1907
May 27.

APPELLATE CIVIL.

Before Mr. Justice Banerji.

MAHARAJ SINGH (DEFENDANT) *v.* CHITTAR MAL (PLAINTIFF) *

Civil Procedure Code, sections 473 (c), 588 (23)—Decree—Order—Appeal—Interpleader suit.

Held that an adjudication upon the claims of defendants in an interpleader suit is a decree and appealable as such under section 540 of the Code of Civil Procedure and not under section 588 of the Code.

THIS was a suit by the Municipal Board of Kasganj as lessee of a certain parao, or camping ground, asking for a decision as to the person to whom the rent for 1904-05 was payable. One Chittar Mal, defendant, claimed the whole rent upon the ground that he had purchased the entire parao in execution of a decree against one Sheoraj Singh, as manager and head of a joint family. Sheoraj Singh did not appear, but his brother Maharaj Singh contested the suit upon the ground that the parao was ancestral property in which he was entitled to a half share and that Chittar Mal was only entitled to one half of the rent in virtue of his purchase of Sheoraj Singh's interest. The Court of first instance (Munsif of Kasganj) decided in favour of Chittar Mal for the whole rent. On appeal by Maharaj Singh this decree was affirmed by the Additional District Judge. Maharaj Singh thereupon appealed to the High Court.

Lala *Girdhari Lal Agarwala*, for the appellant.

Babu *Jogindro Nath Chaudhri* (for whom Babu *Sarat Chandra Chaudhri*), for the respondent.

BANERJI, J.—This appeal arises out of an interpleader suit brought under section 471 of the Code of Civil Procedure by the Collector of Etah, as Chairman of the Municipal Board at Kasganj, against the parties to this appeal. It appears that the Municipal Board of Kasganj had taken on rent a camping ground *(parao)* which belonged to Sheoraj Singh and his brother, Maharaj Singh, the present appellant. Chittar Mal, respondent, obtained a decree against Sheoraj Singh, and in execution of it caused the *parao* to be sold by auction and purchased it

* Second Appeal No. 478 of 1906 from a decree of Khetter Mohan Ghosh, Additional Judge of Aligarh, dated the 14th of March 1906, confirming a decree of Kameshwar Nath, Munsif of Kasganj, dated the 23rd of September 1905.

himself. The rent for the year 1904-05 was not received either by Maharaj Singh or by Chittar Mal. The former claimed a half share in it, while the latter demanded the whole of it. Thereupon the Collector of Etah filed the present suit in order that it might be determined by the Court to whom the rent was to be paid. The Court directed the parties to the present appeal, who were defendants to the suit, to interplead one another, and in the end adjudicated in favour of Chittar Mal, holding that he was entitled to the whole of the money due by the Municipal Board. The decision of the Court of first instance having been affirmed by the lower appellate Court, this appeal has been preferred by Maharaj Singh.

A preliminary objection was taken to the hearing of the appeal on the ground that the appeal from the order of the Court of first instance lay to the lower appellate Court under clause (23) of section 588 of the Code of Civil Procedure; that the decision of the lower appellate Court is final, and that this appeal is not maintainable. In my judgment the objection is not well founded. Section 588 of the Code provides for appeals from orders made in interpleader suits under section 473, clauses *(a)*, *(b)* or *(d)*, section 475 or section 476. It is urged that the decision complained of is an order under clause *(b)* of section 473. It seems to me that section 588 only provides for an appeal from such decisions under section 473 as amount to orders as distinguished from decrees.

A decree is defined by section 2 of the Code to be the formal expression of an adjudication upon any right claimed or defence set up, when such adjudication, so far as regards the Court expressing it, decides a suit or appeal. Any adjudication of title under section 473 is, therefore, a decree and is appealable under section 540. Orders under clauses (*a*), (*b*) and (*d*) are appealable under section 588. Clause (*d*) provides for two things, namely, (1) a direction to the defendants to interplead one another by filing statements and entering into evidence for the purpose of bringing their respective claims before the Court, and (2) an adjudication on such claims. The direction as to interpleading is an order and is appealable under section 588. The adjudication upon the claims of the defendants is a decree and stands on the same footing as an adjudication referred to in

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clause (*c*) of the section. It is, therefore, appealable under section 540 of the Code of Civil Procedure. It seems to me that the Legislature could not have intended that an adjudication as to the title to the thing claimed under clause (*c*) of section 473, should be either final and not appealable or should be appealable as a decree, and yet an adjudication under the last portion of clause (*d*), which is also an adjudication as to title, should be appealable as an order only and not as a decree. It seems to me that when the Legislature omitted clause (*c*) of section 478 from the provisions of section 588 clause (23) and provided only for appeals from orders made under section 473, it clearly meant that adjudications upon title, which are decrees, should be appealable like ordinary decrees under section 540. As, for the above reasons, the decision in this case is a decree, the present appeal is maintainable and the preliminary objection must be overruled.

As regards the merits of the case the contention of Chittar Mal was that the debt, for the realization of which the property in question was sold, had been incurred by Sheoraj Singh as manager of a joint Hindu family for the purposes of that family and that the auction sale in execution of the decree obtained in respect of that debt conveyed to the purchaser the interest of both the brothers. Maharaj Singh, on the other hand, alleged that he was separate from his brother. The Court of first instance found, and this finding has also been affirmed by the lower appellate Court, that the two brothers formed a joint family; that Sheoraj Singh was the head of it; that the debt was binding on Maharaj Singh, and that the auction sale for the realization of that debt conveyed to the purchaser the interests of both the brothers.

The first ground taken in the memorandum of appeal to this Court is that there is nothing to show that the decree obtained by Chittar Mal was passed against Sheoraj Singh in his capacity of manager of a joint Hindu family. No certificate, as required by the rules, has been furnished in regard to this ground. It cannot, therefore, be entertained.

The next plea in the memorandum of appeal refers to an entry in the khewat of the names of both the brothers. That

entry is not inconsistent with the finding that both brothers were joint.

The third plea refers to certain decisions in suits with which the present litigation has nothing to do. It is alleged that in one at least of these suits it was held that the brothers were joint.

The learned vakil for the appellant contends that the lower appellate Court ought to have found whether the debt was contracted for a family necessity. It seems to me that the Court did intend to hold that the debt was incurred for the purposes of the family, but there was no express finding because in the memorandum of appeal to the lower appellate Court no plea was taken to that effect. The appeal, in my opinion, has no force, and the findings of the Court below are fatal to it. I dismiss the appeal with costs.

Appeal dismissed.

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May 30.

Before Sir George Knox, Acting Chief Justice, and Mr. Justice Richards.

GENDA (DEFENDANT) *v.* SUKH NATH RAI (PLAINTIFF) AND RAI SINGH (DEFENDANT).*

Act (Local) No. II of 1901 *(Agra Tenancy Act), sections* 177, 199, 200—*Question of proprietary title—Appeal—Civil and Revenue Courts—Jurisdiction.*

When a Revenue Court, under the powers conferred on it by section 199 of the Agra Tenancy Act, 1901, decides a question of proprietary title it becomes for the moment a Civil Court; an appeal lies at the instance of either party to the District Judge, and if such an appeal is wrongly preferred to and decided by a Commissioner, such decision will have no effect in preventing the Revenue Court's decree from becoming final.

THIS was a suit to recover possession of land, and also for an injunction restraining the defendants from interfering with the possession of the plaintiff. The plaintiff's case was that the defendants had been his tenants, that they had been duly ejected and had retaken possession. One of the defendants appeared and pleaded that the possession was possession as owners, and that they were not and had never been the tenants of the plaintiff *quoad* the land in dispute. It appears that in a suit in the

* Second Appeal No. 263 of 1906, from a decree of G. C. Badhwar, Additional Judge of Saharanpur, dated the 18th of December 1905, reversing a decree of Murari Lal, Munsif of Saharanpur, dated the 18th of September 1905.

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Revenue Court between the same parties the defendants had pleaded that they were proprietors and not tenants. The Assistant Collector on the 19th of January 1903 gave a decree for possession deciding the question of proprietary title himself against the defendants. There was an appeal to the Commissioner, who reversed the finding of the Assistant Collector. The Court of first instance (Munsif of Saharanpur) held that, the Commissioner having no jurisdiction under the circumstances to entertain an appeal from the decision of the Assistant Collector, that decision was final and accordingly dismissed the plaintiff's suit. On appeal by the plaintiff the Additional District Judge reversed the decree of the Munsif and passed a decree in favour of the plaintiff. From this decree the answering defendant appealed to the High Court.

Maulvi *Muhammad Ishaq*, for the appellant.

Babu *Durga Charan Banerji* (for whom Munshi *Gokul Prasad*), for the respondents.

KNOX, ACTING C.J and RICHARDS, J.—This was a suit to recover possession of land, and also for an injunction restraining the defendant from interfering with the possession of the plaintiffs. The plaintiff's case was that the defendant had been his tenant, that the latter had been duly ejected and had retaken possession. The defendant pleaded that his possession was the possession of an owner, and that he was not and had never been the tenant of the plaintiff *quoad* the land in dispute. It appears that in a suit in the Revenue Court between the same parties the defendant had pleaded that he was a proprietor and not a tenant. The Assistant Collector on the 19th of January 1903 gave a decree for possession deciding the question of proprietary title himself against the defendant. There was an appeal to the Commissioner, who reversed the finding of the Assistant Collector. It is quite clear that if the Commissioner had any jurisdiction to entertain the appeal, his decision is binding on the parties and that the plaintiff cannot succeed in the present suit. On the other hand, if the decision of the Commissioner was made absolutely without jurisdiction, and if the decree of the 19th of January 1903 was made by a Court of competent jurisdiction and never set aside on appeal by a Court competent to set it aside, the decree of the 19th

January 1903 must bind the parties. It then becomes necessary to decide the question as to whether or not the Commissioner had jurisdiction to entertain the appeal from the decree of the 19th January 1903. The defendant contends that the Commissioner had no jurisdiction. Section 177 of the Agra Tenancy Act, 1901, provides for appeals to the District Judge in a number of cases, and amongst others, clause (*e*), in all suits in which a question of proprietary title has been in issue in the Court of first instance and is a matter in issue in appeal. Now it is quite clear that in the present case a question of proprietary title was in issue before the Assistant Collector and was also a matter in issue in appeal. *Primâ facie*, therefore, it would appear that an appeal lay to the District Judge and not to the Commissioner. We think that it was clearly the intention of the Legislature that in cases where a question of proprietary title arises, the ultimate decision of the case should rest with the Civil Court, and not with the Courts of Revenue. It is argued, however, that section 179 provides that an appeal shall lie to the Commissioner from all suits included in group C of the fourth schedule to the Act. Now the suit in which the decree of the 19th January 1903 was made was clearly included (at the time of its institution) in group C, and the argument is that, notwithstanding the provisions of section 177, to which we have referred, the appeal did lie to the Commissioner. The section is no doubt somewhat ambiguous. A reference to section 199 makes the matter fairly clear. That section provides that if in any suit filed in the Revenue Court against a person who is alleged to be the plaintiff's tenant, the defendant pleads proprietary right, the Revenue Court is either to require the defendant to go to the Civil Court, as provided by clause (*a*), or to determine the question itself, as provided by clause (*b*). It must be assumed that in the suit before the Assistant Collector, the latter decided to determine the question himself which in fact he did do when he gave the decree of the 19th January 1903. Clause (3), section 199, then provides that when the Court decides the question of proprietary title, it shall follow the procedure laid down in the Code of Civil Procedure. Section 200 provides how the District Judge or the High Court are to deal with appeals from the Revenue Court where a question of

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title has been determined by that Court. In our judgment when the Assistant Collector decided to determine the question of title himself, the suit ceased to be a suit included in group C, and the Revenue Court for the purposes of that suit ceased to be a Revenue Court in the strict sense of the word and became for the moment a Civil Court competent to try the question of proprietary title, with a right of appeal by either party to the District Judge. The result is that we allow the appeal, set aside the decree of the lower appellate Court and restore that of the Court of first-instance. As we think that the defendant ought to have raised the question of jurisdiction of the Commissioner when the appeal was taken from the Assistant Collector to him, we make no order as to costs.

Appeal decreed.

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May 31.

Before Sir George Knox, Acting Chief Justice, and Mr. Justice Richards.

HANSRAJ PAL (PLAINTIFF) *v.* MUKHRAJI KUNWAR AND OTHERS (APPLICANTS) AND DALPAT PAL AND OTHERS (DEFENDANTS).*

Civil Procedure Code, section 232—*Decree for possession of immovable property—Sale of property decreed—Right to execute decree.*

If a decree-holder holding a decree for possession of immovable property sells a portion of such property, the sale does not, without express provision to that effect give the purchaser any right to execute the decree himself. *Ram Sahai* v. *Gaya* (1) referred to.

IN this case one Hansraj Pal having obtained a decree for the possession of certain immovable property sold a portion of the property so decreed, but did not execute any assignment of the decree. The vendees made an application under section 232 of the Code of Civil Procedure contending that the effect of the sale deed was to transfer to them a right to execute the decree to the extent of the property comprised therein. The Court to which this application was made (Subordinate Judge of Gorakhpur) refused the application. On appeal, the District Judge held that section 232 of the Code, did apply under the circumstances and that the applicants were entitled to execute the decree in the manner asked for, and accordingly set aside the order of the first Court and remanded the case under section 562 of

* First Appeal No. 82 of 1906, from an order of R. L. H. Clarke, District Judge of Gorakhpur, dated the 23rd of May 1906.

(1) (1884) I. L. R., 7 All., 107.

the Code. From this order the plaintiff appealed to the High Court.

Munshi *Iswar Saran* for the appellant.

Munshi *Gobind Prasad*, for the respondents.

KNOX, ACTING C.J., and RICHARDS, J.—In this suit the plaintiff obtained a decree for possession of certain immovable property. After recovery of the decree the plaintiff sold a portion of the property to different persons reserving some portion of the property to himself. The respondents applied under section 232 of the Code of Civil Procedure, contending that by the sale deed the decree had been transferred to them to the extent of the property mentioned in the sale deed, and that they were entitled to execute the decree. The Court to which the application was made refused the application. The present respondents appealed, with the result that the decision of the Court of the first instance was reversed, the Court holding that section 232 did apply under the circumstances and respondents were entitled to execute the decree in the manner they asked, and remanded the case under section 562 of the Code of Civil Procedure. The decree-holder now appeals against the order of remand. He contends that no appeal lay from the decision of the Court of first instance, the Court having refused to allow the respondents to execute the decree under section 232. He also contends that under no circumstances could the provisions of section 232 apply to the transaction between him and the respondents. We will take the second point first, because if this point be decided in favour of the appellant, it becomes quite unnecessary to decide whether or not an appeal lay from the order refusing to allow execution under section 232. We have considered the sale deed, which is on the record, and we find that it in no way purports to sell or transfer the decree. The only reference to the decree is that the vendor states, after selling the property and having referred to the description of it, "to which my title has been declared by the decree," *et cetera*. We have to consider whether a sale of the property for possession of which a vendor has obtained a decree necessarily carries with it assignment of decree itself. We certainly think that it does not. It might happen that a vendor might get a decree for possession of the property together with an award of a large sum for mesne

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profits and costs. It could never be contended that if before he executed the decree he sold the property or a portion of it that this sale deed without express words would carry with it the right to the mesne profits and costs. In the decision of this Court in *Ram Sahai* v. *Gaya* (1) Mr. Justice Mahmood has further illustrated the difference between a transfer of property and a transfer of a decree. It is the respondents' misfortune, if, when obtaining a sale deed of the property, they neglected to provide either that the decree should be assigned to them or that the decree-holder should be bound to execute the decree and put them into possession. We wish to point out that in deciding this appeal in favour of the appellant, we do so on the ground that no application could legally be made to execute the decree under section 232. We make this remark lest our present decision should prejudice any suit which the respondent may be advised to institute in order to get the benefit of their sale deed. As a result, we must allow the appeal, set aside the order of the lower appellate Court and restore that of the Court of first instance with costs.

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June 3.

Before Mr. Justice Aikman.

KANIZ FATIMA (DEFENDANT) *v.* WALI-ULLAH AND OTHERS (PLAINTIFFS).*

Benamidar—Suit for sale on a mortgage—Decree giving benamidar a right to redeem—Right to redeem not availed of—Subsequent suit for redemption by alleged beneficial owner barred.

A decree for sale on a mortgage was passed giving a right of redemption to a puisne mortgagee. The puisne mortgagee did not redeem and the decree became absolute. *Held* that no subsequent suit for redemption would lie by a person alleging that he was the real puisne mortgagee and that the person whose name appeared in the decree as puisne mortgagee was merely a benamidar.

THE facts of this case are as follows:—

IN 1891 the predecessor in title of one Musammat Sadiq-un-nissa made a mortgage in favour of Hakim Waris Ali of the property in suit. On the 18th of January 1897 Sadiq-un-nissa and her husband made a mortgage of the same property in favour of

* Second Appeal No. 599 of 1906, from a decree of Pitambar Joshi, Subordinate Judge of Bareilly, dated the 12th of April 1906, confirming a decree of Banke Bihari Lal, Munsif of Bareilly, dated the 30th of June 1905.

(1) (1884) I. L. R., 7 All., 107.

one Ali Jan. In 1900 Hakim Waris Ali brought a suit upon his mortgage, making Ali Jan the puisne mortgagee, a party to the suit. In that suit Hakim Waris Ali got a decree for sale, an opportunity being given both to the mortgagor and to Ali Jan, to redeem Waris Ali's mortgage. The mortgage was not redeemed, and an order absolute was passed under section 89 of the Transfer of Property Act. The present suit was brought by one Wali-ullah, who came into Court alleging that he was the real mortgagee of the mortgage of 1897, and that Ali Jan was his benamidar, and he sued on the strength of his secret title to bring the property to sale after redeeming Waris Ali's mortgage. There is no suggestion that the prior mortgagee knew that Ali Jan was merely a benamidar. The Court of first instance (Munsif of Bareilly) gave the plaintiff a decree and this decree was confirmed on appeal by the Subordinate Judge. The present appeal was preferred by one of the defendants, Kaniz Fatima, who purchased the property from Musammat Sadiq-un-nissa in 1893.

Mr. *Muhammad Ishaq Khan* and Munshi *Jang Bahadur Lal*, for the appellant.

Maulvi *Ghulam Mujtaba*, for the respondents.

AIKMAN, J.—This appeal arises out of a suit brought by the plaintiff Wali-ullah for sale upon a mortgage after redemption of a prior mortgage. It appears that in 1891 the predecessor in title of one Musammat Sadiq-un-nissa made a mortgage in favour of Hakim Waris Ali of the property in suit. On the 18th of January 1897 Sadiq-un-nissa and her husband made a mortgage of the same property in favour of one Ali Jan. In 1900 Hakim Waris Ali brought a suit upon his mortgage, making Ali Jan, the puisne mortgagee, a party to the suit. In that suit Hakim Waris Ali got a decree for sale, an opportunity being given both to the mortgagor and to Ali Jan to redeem Waris Ali's mortgage. The mortgage was not redeemed, and an order absolute was passed under section 89 of the Transfer of Property Act. The respondent, Wali-ullah, now comes into Court alleging that he was the real mortgagee of the mortgage of 1897, and that Ali Jan was his benamidar, and he sues on the strength of his secret title to bring the property to sale after redeeming Waris Ali's mortgage. There

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is no suggestion that the prior mortgagee knew that Ali Jan was merely a benamidar. The Courts below have given the plaintiff a decree. Kaniz Fatima, who purchased the property from Musammat Sadiq-un-nissa in 1893, comes here in second appeal.

In my opinion the first plea in the memorandum of appeal must be sustained. The plaintiff's benamidar was given an opportunity to redeem and failed to avail himself of it. In my opinion it is now too late for the plaintiff to come in and treat the order absolute passed against his benamidar as a nullity. It has been held in many cases that a decision passed in a suit brought by a benamidar binds the beneficial owner. I see no reason why a similar rule should not be applied to the case of a suit brought against the benamidar. In my opinion the plaintiff is bound by the decree in Waris Ali's suit and he has lost his right of redemption. It may be that, as representing Ali Jan, he may pay the money due to the prior mortgagee if an application is made for the sale of the property, but in my opinion his suit, as brought, ought to have been dismissed.

For the above reasons I allow the appeal and set aside the decrees of the Courts below. The appellant will have her costs in all Courts.

Appeal decreed.

1907
June 18.

REVISIONAL CIVIL.

Before Mr. Justice Aikman.

ABDUL HAMID (PLAINTIFF) *v.* RIAZ-UD-DIN (DEFENDANT).*

Civil Procedure Code, section 506—*Arbitration—Reference made orally, but reduced to writing by the Court—Irregularity.*

Where both parties to a pending suit consented to a reference to arbitration and an order of reference was then and there made by the Court in the presence of the parties, though not upon a written application, it was *held* that it was not open to the Court, having regard to the provisions of section 510 of the Code of Civil Procedure, to supersede that reference, the arbitrator not having declined to act. *Nusserwanjee Pestonjee* v. *Meer Mynoodeen Khan* (1) distinguished. *Shama Sundram Iyer* v. *Abdul Latif* (2) and *Luxumibai* v. *Hajee Widina Cassum* (3) followed.

THIS was an application for the revision of a decree of the Court of Small Causes at Agra. The applicant filed a suit against

* Civil Revision No. 34 of 1907, against the decree of Muhammad Sirajuddin, Judge of the Court of Small Causes, Agra, dated the 9th of March 1907.

(1) (1855) 6 Moo. I. A., 134. (2) (1899) I. L. R., 27 Calc., 61.
(3) (1899) I. L. R., 23629.